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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 732.

UNITED STATES OF AMERICA,
APPELLANT,

v.

JAMES E. FARRAR,
DEFENDANT, APPELLEE.

BRIEF FOR THE APPELLEE.

I.

CASE STATED.

This is an appeal by the United States under the Criminal Appeals Act of March 2, 1907, ch. 2564, 34 Stat. at L. 1246, U. S. C. Title 18, sec. 682 and sec. 238 of the Judicial Code as amended, from a judgment of the District Court of the United States for the District of Massachusetts quashing an indictment against James E. Farrar in which he was charged with the purchase of intoxicating liquor as defined by the National Prohibition Act.

The indictment was returned February 7, 1930, and is No. 9390 of the criminal docket. Motion to quash was filed February 13, 1930, upon the ground that the indictment, as appears upon page 1 of the record, sets forth no offence under the laws of the United States. The opinion of the

Court quashing the indictment was handed down March 7, 1930, and appears upon pages 2, 3 and 4 of the record.

The indictment charges in substance that the defendant did "unlawfully and knowingly purchase from one Frank Rotondo of Medford in said district intoxicating liquor containing one-half of one per cent or more of alcohol by volume and fit for use for beverage purposes as defined in the act of Congress of October 28, 1919, commonly known as the national prohibition act, to wit, two pints, more or less, thereof."

The Criminal Appeals Act, supra, provides for an appeal "from a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or *construction of the statute upon which the indictment is founded.*"

It should be noted in passing, that the indictment does not plead any statute under which it is drawn, nor does it set forth facts bringing it within any statute, nor does it specifically allege that the purchase was in violation of the National Prohibition Act.

While it is true that the statute itself need not be pleaded, facts and circumstances must be set forth to show that an offence has been committed under some specific statute.

Pettibone v. *U. S.*, 148 U. S. 197.

U. S. v. *Nixon*, 235 U. S. 231.

Williams v. *U. S.*, 168 U. S. 382.

The United States claims that the indictment sets forth an offence under section 6 of Title II of the National Prohibition Act, which, so far as applicable here is as follows:

> "No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the Commissioner so to do," . .

The Government also claims that the punishment is provided for in section 29 by the provision as follows:

> "Any person violating . . the provision of this Title for which offence a special penalty is not prescribed, shall be fined for a first offence not more than five hundred dollars."

The indictment does not allege that the purchase was made without a permit, or set forth facts showing that the purchase was made without a permit, so as to identify the section under which it is claimed that a purchaser is liable to prosecution.

The question as to the interpretation, or sufficiency of the indictment was not raised in the Court below, and the question presented to the Court and passed upon by the Court was the sole question as to whether an indictment charging a defendant with the purchase of intoxicating liquor is an offence against the United States under section 6 of Title II of the National Prohibition Act.

II.

THE QUESTION AT ISSUE.

The sole question at issue before this Court is whether the United States District Court erroneously construed the statute relied upon by the United States, to wit, section 6 of Title II of the National Prohibition Act.

U. S. v. *Birdsall*, 233 U. S. 223.

U. S. v. *Colgate*, 250 U. S. 300.

U. S. v. *Schrader*, 252 U. S. 85.

U. S. v. *Yuginovich*, 256 U. S. 450.

Katz v. *U. S.*, 271 U. S. 354.

The question is not one of morals or ethics as to whether the buyer is as bad as the seller; nor is it a question as to the inconsistency of a law which punishes the seller and not the buyer, or a law that punishes a privileged class of permittees for buying without a permit and not an occasional or clandestine purchaser. The question before this Court is a simple one of statutory construction.

The Government claims squarely that the provision of section 6, Title II, "No person shall—purchase—any liquor without first obtaining a permit from the Commissioner to do so," is not confined to persons to whom permits to purchase liquor may lawfully issue, but applies to all persons. The District Court ruled that that section applied to permittees, and not to an ordinary purchaser of liquor.

III.

ARGUMENT.

1. Judge Morton held that the buyer of liquor was not guilty of an offence under the National Prohibition Act, and that section 6, relied upon by the Government, related solely to permittees.

Section 6 provides:

> "No one shall manufacture, sell, purchase, transport or prescribe any liquor without first obtaining a permit from the commissioner so to do," etc.

The rest of the section deals with exceptions and permits.

The Senate Judiciary Committee's report embodying its interpretation of section 6 may be found printed as a foot-note to the case of *U. S.* v. *Katz,* 271 U. S. 362, and is as follows:

> "Section 6 prohibits the sale, purchase, transportation or prescription of liquor without a permit from

the Commissioner, issued as prescribed in the section, except the purchase and use for medicinal purposes and for the treatment of alcoholism. This section also exempts sacramental wines from the provisions of the Act, except as to the requirements of section 6 for permits (save for purchase) and to the requirements of section 10 for the keeping of records."

The same section is analyzed by Judge Thompson in *U. S.* v. *Katz*, 5 Fed. (2d) at page 528.

> "Section 6 prohibits selling without first obtaining a permit and prescribes details concerning the time when permits to sell shall expire, the length of time permits to purchase shall be in force, provisions as to what the permits shall specify, and prohibits their issue to persons violating the terms of prior permits. It provides for the prescribing by the commissioner of forms of permits and applications, and empowers that official to require bonds, and provides for the review of his decision by a court of equity in the event of a refusal of an application for a permit."

The title given to section 6 in the National Prohibition Act as published in Acts of Congress, 41 Stat. at L. p. 305, H. R. 6810, October 28, 1919, and in the compilation of the laws issued by the Treasury Department relating to National Prohibition Enforcement, February, 1923, is "Permits Required."

It should be noted also that section 29, the penalty provided for any person violating the terms of his permit, is as follows:

> "Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offence a special penalty is not prescribed, shall be fined for a first offence not more than five hundred dollars."

The Government relies upon the second clause of this penal provision:

> "Any person—who violates any of the provisions of this title for which offence a special penalty is not prescribed;—"

A special penalty for violation of the section is specifically prescribed, albeit it is the same penalty.

The Government relies upon the phrase "no one shall —purchase," etc., ignoring the phrase "without first obtaining a permit," and ignores the penalty for "any person violating the provisions of a permit," and claims that he may be punished under the clause for which a special penalty is not prescribed. The construction put upon section 6, and the penal provisions of section 29, is clearly untenable. The Government takes "no one shall purchase" out of its context in section 6, and finds a penalty in the omnibus clause of section 29.

Section 6 provides:

> "No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit."

Section 6 punishes a person who manufactures, sells, or transports without a permit. If section 6 was not intended to punish a special class of offenders, then section 6 is superfluous as to manufacturing, selling, and transporting, because section 3 also provides for the punishment of those who manufacture, sell, and transport.

The Government calls in aid of its construction put upon section 6, the last clause of section 3, to the effect, that "all provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

There are many things undoubtedly which Congress may do with the laws. It may change the rules of evidence,

the burden of proof, may write its own definitions, but it cannot delegate to the Courts the power to make laws, or add to a criminal statute what is not there. Liberal construction must stop at a point where it conflicts with the Constitution, and the fundamental principles of the criminal law.

2. THE DECISION OF THE DISTRICT COURT THAT SECTION 6 OF THE NATIONAL PROHIBITION ACT, UNDER WHICH THIS INDICTMENT WAS BROUGHT, APPLIES TO PERMITTEES ONLY, IS OBVIOUSLY CORRECT. THE LANGUAGE OF SECTION 3 READS AS FOLLOWS:

> "No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

In the second paragraph of the same section, which applies specifically to "liquor for non-beverage purposes", the word "purchase" is inserted between the words "manufactured" and "sold". The second clause of section 3 provides:

> "Liquor for non-beverage purposes, and wine for sacramental purposes, may be manufactured, purchased, sold . . . but only as herein provided, and the Commissioner may, upon application, issue permits therefor."

If Congress had intended to prohibit the straight purchase of beverage liquor, we should expect to find the word "purchase" also inserted in the first paragraph, but it was not. There is no possibility that the word "purchase" was

omitted from the first paragraph by inadvertence, since the section is a short one, and the insertion of the word "purchase" in regard to non-beverage liquors is inserted in the immediately following paragraph. Congress must have had in mind "purchase", because it is mentioned in sections 4, 6, 10, 11 and 13, and in every case the purchaser is referred to in connection with a permit.

In section 4, after enumeration of the exempted articles, denatured alcohol, medicinal preparations, flavoring extracts, etc., the act provides:

> "A person who manufactures any of the articles mentioned in this section may 'purchase' and possess liquor for that purpose, but he shall secure permits to . . . 'purchase' such liquor, give the bonds, keep the records, and make the reports specified in this act as directed by the commissioner."

Section 6, dealing with the permits referred to in section 4, again mentions purchase. "No one shall manufacture, sell, 'purchase', transport or prescribe any liquor without first obtaining a permit." Again in section 6: "Permits to 'purchase' liquor shall specify the quantity and kind to be purchased, and the purpose for which it is to be used."

Again in section 10, Congress must have had in mind purchase when it provided: "No person shall manufacture," "purchase for sale," etc., without keeping a record of the liquor so purchased.

Again in section 11: "All manufacturers, and wholesale and retail druggists, required to keep as part of the records—a copy of all permits to purchase"—.

Section 13 makes it the duty of a carrier to make a record of the receipt of liquor to be transported, and it shall deliver only to persons who present a verified copy of a "permit to purchase."

A glance at section 29, dealing with punishments, is illuminating. The very first paragraph provides:

"Any person who manufactures or sells liquor in violation of this title shall for a first offence be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offence shall be fined not less than $200 or more than $2,000 and be imprisoned not less than one month nor more than five years."

The first paragraph obviously deals with violations of the law by others than permittees. It is noted that the word "purchase" does not appear in this clause.

The second clause provides:

"Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months or more than two years."

The Government finding no penalty for the alleged offence of purchasing liquor either in the first or second clause, relies upon the third, "or violates any of the provisions of this title, for which offense a special penalty is not prescribed." It might be pertinent to ask, What "provisions of this title" has the purchaser violated for which a penalty is not prescribed?

If we return to section 6, the purchaser there is a purchaser with a permit, and a special penalty is provided for the violations of the terms of the permit in the second clause of section 29.

If Congress had intended to punish the purchase of liquor, it could have done so by simply inserting the word "purchase" in the first paragraph of section 3, and pro-

vided for punishment of the purchaser in the first paragraph of section 29. The fact that the word "purchase" does not appear either in sections 3 or 29, is clear and convincing evidence that Congress never intended to make the purchaser an offender.

There is no inconsistency or contradiction in the contention that Congress intended to punish purchasers who are required to have a permit, and not those who are not required to have a permit. The former class owes a legal duty to the Government for the privilege it holds; the latter owes no duty to the Government, and runs the risk of prosecution for other offences. As the learned Judge in the Court below put it, "There are strong reasons why permittees should be penalized for the abuse of the privileges granted them."

This Court is asked to write the word "purchase" into the first paragraph of section 3, or strike out the words "without a permit" in section 6. It must do one or the other to make the purchaser an offender. To borrow a phrase used by the late Mr. Justice Sanford in *Everard Breweries* v. *Day*, 265 U. S. 543, this would be "to pass the line which circumscribes the judicial department and to tread upon legislative ground."

3. Judge Morton relies strongly upon the case of *United States* v. *Katz*, 271 U. S. 354, which is decidedly analogous to the case at bar. In that case two defendants were indicted for conspiracy to sell whiskey without making a permanent record of the sale, in violation of section 10.

Section 10 provides in substance, that no person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof, etc.

The demurrers to three indictments were sustained in the lower court, and the case came to this court under the Criminal Appeals Act.

The question before this Court was, whether the words "no person shall—sell liquor—without making at the time

a permanent record thereof" is a regulatory measure applicable only to persons authorized to deal in intoxicating liquor, or whether it was intended to apply to every criminal violator of the National Prohibition Act, even though making a single isolated sale.

This Court, in affirming the decision of the District Court sustaining the demurrers, held squarely that the words "no person" in section 10, refer to persons authorized under other provisions of the Act to carry on traffic in intoxicating liquor.

The Court placed section 6 in the same catagory with section 10, as a regulatory measure dealing with the disposition of alcoholic liquor not prohibited by the 18th Amendment in such a manner as to minimize the danger of its diversion from authorized or permitted uses to beverage purposes, when it said:

> "All the thirty-nine sections in Title II of the Act, which deal with National Prohibition, more than half, including the seven sections which precede section 10, contain provisions authorizing or regulating the manufacture, sale, transportation, or use of intoxicating liquor for nonbeverage purposes."

"These provisions read together clearly indicate a statutory plan or scheme to regulate the disposition of alcoholic liquor not prohibited by the 18th Amendment in such manner as to minimize the danger of diversion from authorized or permitted uses to beverage purposes. These provisions plainly relate to those persons who are authorized to sell, transport, or possess intoxicating liquors under the 18th Amendment and the provisions of section 3 of the Act already quoted."

In the Katz case the defendants were not permittees, and were not persons required to make a record, just as in this case the defendant was not a permittee.

IV.

The meaning of a statute is determined by the language used therein, and the subject-matter to which it relates.

U. S. v. *Trans Missouri Freight Asso.*, 166 U. S. 290.

U. S. v. *Standard Brewery*, 251 U. S. 210.

Danigor v. *Cooley*, 248 U. S. 319.

DeGaney v. *Lederer*, 250 U. S. 376.

Bailey v. *Drexell Furniture Co.*, 259 U. S. 23.

However broad and general the language may be, the Court will restrain its operation within narrower limits than its words import, if satisfied that the literal meaning of its language would extend to cases which the legislature never designed to include in it, or embrace in it.

Washington Market v. *Huffman*, 101 U. S. 112.

McKee v. *U. S.*, 164 U. S. 287.

It is not admitted that there is any ambiguity here, but if there is, the character of the statute determines the construction, and a criminal statute is strictly construed, and the Court will so construe the statute as to carry out the intention of the legislature.

U. S. v. *Baltimore & O. S. W. R. Co.*, 222 U. S. 8.

Caldron v. *Atlas Steamship Co.*, 170 U. S. 272.

U. S. v. *Lexington Mill & Elev. Co.*, 232 U. S. 399.

V.

The legislative intention of an act may be ascertained by recourse to its history, the mode in which amendatory words, if any, were introduced as shown by the journals

and records, and may give such construction to the statute as will carry out the intention of Congress.

Standard Oil Co. v. *U. S.*, 221 U. S. 1.

Blake v. *National City Bank*, 23 Wall. 307.

Butterfield v. *Stranahan*, 192 U. S. 470.

The records of Congress will show that there was a proposal to insert the word "purchase" into the 18th Amendment, and it was rejected by a vote of 62 to 4, 30 not voting.

Congressional Record, 65th Congress, first session, Vol. 55, part 6, page 5645, dated August 1, 1917, the Senate had under consideration joint resolution of the Senator from Texas proposing an amendment to the Constitution.

Senator Hardwick of Georgia proposed an amendment to Article 1, section 1.

Mr. HARDWICK. Mr. President, I desire to offer the amendment which I sent to the desk, so that it may be pending.

The PRESIDING OFFICER. The Secretary will state the amendment.

The SECRETARY. On page 1, line 9, after the word "sale" it is proposed to insert "purchase, use."

Mr. HARDWICK. Mr. President, the joint resolution of the Senator from Texas proposing an amendment to the Constitution prescribes, without reading the preliminary part:

> Article—section 1. The manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes is hereby prohibited.

I have proposed by the amendment which has just been read, to amend this section so that it shall read as follows:

Manufacture, sale, purchase, use or transportation—

If the amendment I have suggested is agreed to, we will not only prohibit the manufacture, sale, transportation and importation of intoxicating liquor for beverage purposes, but also prohibit, if this article should be ratified by the requisite number of states, the purchase and use of intoxicating liquor.

It is hard for me to see why it should be made unlawful to sell an article and not equally unlawful to buy it. It is hard for me to see why, if the manufacture and sale are to be forbidden, the purchase ought not also to come under the ban of the law. It is impossible for me to understand why, if it is to be unlawful to manufacture and to sell it, to buy it and transport it, to import it or export it, it ought not also be unlawful to use it.

Mr. BORAH. Mr. President—

Mr. HARDWICK. I yield to the Senator from Idaho.

Mr. BORAH. I desire to ask the Senator if that would not accentuate rather than lessen the evils which he presented so ably to the Senate yesterday, with reference to the fundamental objections which the Senator has to the joint resolution?

Mr. NORRIS. Mr. President—

Mr. HARDWICK. I yield to the Senator from Nebraska.

Mr. NORRIS. I wish to ask the Senator if he doesn't think that it would be very difficult to secure a conviction or to secure evidence of an illegal sale if the purchase of it also were made illegal, because the witness, who as a rule is the purchaser, would be protected from answering on the ground that the answer might incriminate himself.

Mr. HARDWICK. I do not think that is true. It seems to me that evidence could be obtained without that. The people who buy very rarely give evidence anyway.

Mr. NORRIS. Never willingly, but as a rule in prosecutions for the illegal sale of liquor the purchaser is a witness, although an unwilling one.

Mr. Hardwick urged in his reply that immunity might

be given to the buyer, and added further that "it strikes me, Mr. President, it is utterly and entirely dishonest to say we will make it unlawful to sell this article and not equally unlawful to buy it."

Page 5647, the President pro tempore. "The pending question is on the amendment of the Senator from Georgia (Mr. Hardwick.)

Mr. SHEPPARD. I hope the amendment of the Senator from Georgia will be voted down. It is not necessary to the accomplishment of the purposes of the resolution. We should employ in the organic law as few terms as possible in order to reach the purpose we have in mind. I trust that the amendment of the Senator from Georgia will be rejected.

Mr. HARDWICK. Does the Senator state any specific objection to my amendment?

Mr. SHEPPARD. I say it is unnecessary, and I do not want to put any unnecessary language in the constitutional amendment.

The PRESIDENT pro tempore. The question is on the amendment of the Senator from Georgia, Mr. Hardwick, to insert the words "purchase, use" after the word "sale".

Mr. HARDWICK. I ask for the yeas and nays."

Upon roll call, page 5648 of the same volume, it appears that the amendment to insert the words "purchase, use" was defeated, yeas 4, nays 62, not voting 30.

41 Stat. at L. 305, shows that H. R. 6810, dated October 28, 1919, became the National Prohibition Act, and was enacted in pursuance of the power of Congress "to enforce this article by appropriate legislation," and the general power vested in Congress under Article 1, section 8, clause 18, to make all laws necessary for carrying out the execution of the foregoing powers.

The marginal note or heading to section 3, Title II is "Acts Prohibited when the National Prohibition in Force, Vol. 40, p. 941," reference being to the ratification of the 18th Amendment.

Section 3 of Title II defines the offences or the acts

prohibited for persons not permittees, and did not include therein *the purchaser.*

It is to be presumed that Congress, in enacting the National Prohibition law, intended to keep within the scope of its constitutional authority, and not to go outside of it.

This Court said in *U. S.* v. *Standard Brewery,* 251 U. S. at 220:

> "Furthermore, we must remember in considering an act of Congress, that a construction which might render it unconstitutional is to be avoided."

As further evidence that the National Prohibition Act did not intend to make the purchase of intoxicating liquor criminal, this Court may take judicial notice of Senate Bill 1827, introduced by the same Senator Sheppard, proponent of the joint resolution which became the 18th Amendment, September 30, 1929, title being, *"A Bill Amending the National Prohibition Act so as to Prohibit the Purchase of Intoxicating Liquors as a Beverage,"* and provides:

> "The National Prohibition Act as amended and supplemented shall be and hereby is amended by inserting the word 'purchase' between the words 'manufacture' and 'sale' in section 3 of said act, so that said section as thus amended will read as follows:
>
> "No person shall on or after the date when the 18th amendment to the Constitution of the United States goes into effect, manufacture, purchase, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this Act."—

VI.

Judge Morton in his opinion quashing the indictment laid stress upon the fact that it has been uniformly held by prosecuting officers, and the public at large, for more

than ten years, that the purchase of liquor was not an offence under the National Prohibition Act, and said:

"The proper construction of a statute over a long period of time was held to be highly significant as to its true meaning, citing *State* v. *Teehan*, 50 Conn. 92; *State* v. *Rand*, 51 N. H. 361."

If the meaning of a statute is open to doubt, the contemporaneous construction placed upon it when it became operative and acquiesced in by the executive, the legislature, and the courts, or those charged with its enforcement, is highly persuasive of what the law is."

Lewis's Sutherland and Statutory Construction, Vol. 2, sections 471—479.

Hahn v. *U. S.*, 107 U. S. 402.

Cohens v. *Virginia*, 6 Wheat 264.

U. S. v. *Alger*, 152 U. S. 384.

U. S. v. *Minn.*, 270 U. S. 181.

As pointed out by the opinion of the Court below, there is dicta from at least three circuits—second circuit in *Beecher* v. *U. S.*, 5 Fed. (2) 45; third circuit, *Norris* v. *U. S.* 34 Fed. (2d) 839; eighth circuit *Dickinson* v. *U. S.* 18 Fed. (2d) 887—to the effect that a sale is not punishable under the National Prohibition Act.

TEXTWRITERS UPON PROHIBITION.

It is notable that every textwriter upon the National Prohibition law for the last ten years has held that a purchaser or buyer is not guilty of any offence under the National Prohibition Act.

McFadden on Prohibition, page 294, sec. 267. "Purchaser Assumes no Liability."

"The purchaser of liquor is not criminally liable as the National Prohibition Law is against the sale of

liquor and not the purchase. Likewise, a person who assists a purchaser is not liable."

Blakemore on Prohibition, p. 151:

"Prohibition of the Volstead Act is against the sale and not the purchase of intoxicating liquor." "And the purchaser of intoxicating liquor seems to run no risk of prosecution as a purchaser, as there is no law which makes it a crime to participate in the illegal sale as a purchaser."

National and State Prohibition under the Eighteenth Amendment. Thorpe, published 1926, p. 196:

"Under the National Prohibition Act it is no crime to purchase intoxicating liquor. Congress has taken half of the transaction and labeled that as a crime."

Seinge v. *U. S.*, C. C. A. N. Y. 278 Fed. 415, Certiorari denied 272 U. S. 620.

Nelson Federal Liquor Laws, 1930, p. 326, sec. 1022, heading, PURCHASE NO OFFENSE:

"Purchase of liquor is no offence under the National Prohibition Act."

Wayne B. Wheeler Federal & State Laws relating to intoxicating liquor, 3rd Edition, p. 69:

"One employed to make a purchase of intoxicating liquor for the purpose of offering as a witness against the defendant was not an accomplice within sections 1540, 2370 L. O. L., so that convictions could be had on his uncorroborated testimony, the crime being the sale and not the purchase," citing *State* v. *Busick*, 90 Ore. 466.

In that case the Court said:

> "While it is true that a sale cannot be made without a purchaser, it is also true that under the state statute the crime is in the sale of intoxicating liquor and not in the purchase."

VII.

Not until the Farrar case has any prosecution been undertaken against a mere buyer.

Administrative necessity or supposed public policy cannot add to an Act of Congress and make conduct criminal which the law leaves untouched.

Sarlls v. *U. S.*, 152 U. S. 570.

U. S. v. *Standard Brewery*, 251 U. S. 210.

The latter case was an indictment against the defendant under the wartime prohibition act, that statute prohibiting the manufacture of intoxicating liquor. The Internal Revenue Department determined, and ruled that a beverage containing one-half of one per cent of alcohol should be regarded as intoxicating liquor within the intent of the Act. The Court said:

> "Nothing in the act permits the determination of that question to the decision of the revenue officers of the Government. While entitled to respect, as such decisions are, they cannot enlarge the meaning of a statute indicated by Congress. Administrative rulings cannot add to the terms of an Act of Congress and make conduct criminal which such laws leave untouched."

Citing,

Waite v. *Macy*, 246 U. S. 606.

U. S. v. *George*, 228 U. S. 14.

U. S. v. *United Verde Copper Co.*, 196 U. S. 207.

4. The issue in this case, while far reaching in its effect, nevertheless is the case of a criminal indictment against the defendant Farrar. It is fundamental, therefore, that he should be informed beforehand that the act he is doing is criminal, and that he will be punished therefor.

In *U. S.* v. *Wilterberger,* 5 Wheat. 96, Chief Justice Marshall said:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define a crime, and to ordain its punishment."—"To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provision, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, as those which are enumerated."

Again, this Court has said in *U. S.* v. *Reese,* 92 U. S. 214:

> If the legislature undertakes to define by statute a new offence and provide for its punishment, it should express itself well in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

In *ex Parte Webb,* 225 U. S. 663, this Court said:

> "We are reminded that 'laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.'

(U. S. v. Brewer, 139 U. S. 278); and that ambiguity and uncertainty about the meaning of a criminal statute ought to be resolved by a strict interpretation in favor of the liberty of the citizen."

SUMMARY.

It is submitted:

1. That the conclusion of the District Judge is irresistible, that "If Congress had intended to introduce such a revolutionary change in existing methods of dealing with the liquor problem, making the ordinary buyer criminally liable, it would have said so in no uncertain terms."

2. There is no ambiguity in the statute which permits the construction placed upon it by the Government. It is plain that section 6 deals with permittees, and that a penalty is provided for buyers who violate the terms of their permit. It was never contemplated that the purchaser from a bootlegger should have a permit.

3. If there is any ambiguity in the statute, the Congressional record of the debates upon the joint resolution which became the 18th Amendment, shows that the buyer was expressly left out of the acts prohibited by the 18th Amendment. One cannot escape the conclusion that this was done deliberately.

4. The National Prohibition Act, in section 6 of Title II, dealt exclusively with the problem of permittees, and the prevention of diversion of intoxicating liquor from medicinal and industrial uses to use for beverage purposes, and provided for that class of offenders.

5. Not until this case has any prosecuting officer indicted a mere buyer. Failure to prosecute the buyer must have had the approval of the executive department of the Government, and neither administrative necessity, nor convenience, can now make the buyer a criminal unless the law plainly makes him so.

6. The question as to whether Congress could make the purchase of intoxicating liquor criminal under the provisions and the powers contained in the 18th Amendment is not before the Court.

It is respectfully submitted that the decision of the District Court quashing the indictment should be affirmed.

Respectfully submitted,

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